



4310-K6

ADVISORY COUNCIL ON HISTORIC PRESERVATION

**Notice of Amendment to the Program Comment to Exempt
Consideration of Effects to Rail Properties within Rail
Rights-of-Way**

AGENCY: Advisory Council on Historic Preservation

ACTION: Notice of Adoption of Amendment to the Program
Comment to Exempt Consideration of Effects to Rail
Properties within Rail Rights-of-Way

SUMMARY: The Advisory Council on Historic Preservation (ACHP) has approved an amendment to the Program Comment to Exempt Consideration of Effects to Rail Properties within Rail Rights-of-Way. The amendment extends the deadline for the Department of Transportation to prepare and publish the implementing guidance to allow implementation of the property-based approach.

DATES: The amendment went into effect on June 10, 2019.

ADDRESSES: Address any questions concerning the amendments to Jaime Loichinger, Office of Federal Agency Programs,

Advisory Council on Historic Preservation, 401 F Street,
NW, Suite 308, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Jaime Loichinger, (202)
517-0219, jloichinger@achp.gov.

SUPPLEMENTARY INFORMATION: Section 106 of the National
Historic Preservation Act, 54 U.S.C. 306108, requires
federal agencies to consider the effects of their
undertakings on historic properties and to provide the
Advisory Council on Historic Preservation (ACHP) a
reasonable opportunity to comment with regard to such
undertakings. The ACHP has issued the regulations that set
forth the process through which federal agencies comply
with these duties. Those regulations are codified under 36
CFR part 800 (Section 106 regulations).

Under Section 800.14(e) of those regulations, agencies
can request the ACHP to provide a "Program Comment" on a
particular category of undertakings in lieu of conducting
individual reviews of each individual undertaking under
such category, as set forth in 36 CFR 800.4 through 800.7.
An agency can meet its Section 106 responsibilities with
regard to the effects of particular aspects of those

undertakings by taking into account an applicable Program Comment and following the steps set forth in that comment.

On August 17, 2018, the ACHP issued the Program Comment to Exempt Consideration of Effects to Rail Properties within Rail Rights-of-Way at the request of the U.S. Department of Transportation (USDOT). See 83 FR 42920 (August 24, 2018). This Program Comment accelerates the review of undertakings affecting rail properties within rail rights-of-way under Section 106 of the National Historic Preservation Act and meets the requirement of Section 11504 of the Fixing America's Surface Transportation Act. The Program Comment can be used by any federal agency with responsibility to consider the effects of undertakings within rail rights-of-way.

The Program Comment is comprised of two major parts: (1) an activity-based approach, and (2) a property-based approach. The activity-based approach provides a list of activities in Appendix A for which, when the specific conditions are met, no further Section 106 review is required. The property-based approach establishes a process whereby project sponsors can opt to work with the relevant USDOT Operating Administration and stakeholders to develop a list of excluded historic rail properties that would continue to be subject to Section 106 review, and exempt

from review the effects of undertakings to all other historic rail properties within a designated area. While the activity-based approach was effective immediately, the property-based approach does not go into effect until USDOT publishes implementing guidance. This amendment extends the deadline for USDOT to publish the implementing guidance to October 14, 2019.

In May 2019, the USDOT requested that the ACHP amend its Program Comment. As a result of the 35-day partial government shutdown earlier this year, the additional time necessary to review guidance in accordance with USDOT's new departmental review process, and to allow adequate time for necessary stakeholder reviews, USDOT was not able to meet the original deadline in the Program Comment and therefore requested a one-time 150-day extension to develop and issue the guidance. USDOT expects this amendment will constitute a one-time extension.

In considering USDOT's request, ACHP staff discussed the amendment with ACHP members during the Federal Agency Programs Committee call on May 20, 2019, and also during a conference call for all members which took place on May 30, 2019. Comments were received regarding the members' interest in discussing the draft guidance during the next ACHP business meeting in July. USDOT was also asked to

provide additional context for why a 150-day extension was needed, and USDOT emphasized that the uncertainty of its new internal review and other factors made such a request necessary.

The ACHP membership voted unanimously to adopt the amendment on June 10, 2019.

What follows is the text of the Program Comment, incorporating the adopted amendment:

Program Comment to Exempt Consideration of Effects to Rail Properties within Rail Rights-of-Way, as amended

Advisory Council on Historic Preservation

Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. 306108 (Section 106), requires federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued regulations that set forth the process through which federal agencies comply with these responsibilities. Those regulations are codified under 36 CFR part 800 (Section 106 regulations).

Under section 800.14(e) of the Section 106 regulations, agencies can request the ACHP to provide a program comment on a particular category of undertakings in

lieu of conducting separate reviews of each individual undertaking under such category, as set forth in 36 CFR 800.3 through 800.7. Federal agencies can satisfy their Section 106 responsibilities with regard to the effects of undertakings on rail properties located in railroad and rail transit rights-of-way (rail ROW) by following this program comment and the steps set forth therein.

I. Introduction

The ACHP issued this program comment to exempt consideration of effects under Section 106 to rail properties located within rail ROW in August 2018. The amendment to this program comment is for the sole purpose of extending the timeline for development of the Implementing Guidance for the Property-Based Approach under section IV.C. This program comment has been developed in accordance with Section 11504 of the FAST Act (49 U.S.C. 24202), which mandated the development of a Section 106 exemption for "railroad rights-of-way." More specifically, it required the Secretary of Transportation to submit a proposed exemption to the ACHP for consideration, and for the ACHP to issue a final exemption not later than 180 days after the date of receipt of the U.S. Department of Transportation's (USDOT) submittal.

This program comment establishes two methods to meet the statutory directive: an activities-based approach and a property-based approach. The activities-based approach described in section III exempts from Section 106 review the activities listed in Appendix A, "Exempted Activities List," provided the conditions outlined therein are met. Those activities involve maintenance, repair, and upgrades to rail properties that are necessary to ensure the safe and efficient operation of freight, intercity passenger, commuter rail, and rail transit operations. While those activities may over time alter various historic elements within rail ROW, these changes are likely to be minimal or not adverse and are necessary to continue meeting the transportation needs of the nation. The property-based approach described in section IV provides an optional process for identifying excluded historic rail properties that are subject to Section 106 review, while exempting consideration of effects to other rail properties.

If a federal agency responsible for carrying out, licensing, permitting, or assisting an undertaking with the potential to affect historic rail properties meets the terms of this program comment, its Section 106 responsibility to take into accounts those effects will be satisfied.

II. Applicability

A. Applicability of Program Comment

1. The program comment applies to undertakings that may affect rail properties located within rail ROW. Any federal agency responsible for an undertaking located within rail ROW may utilize this program comment to satisfy its Section 106 responsibilities for those undertakings.

2. Under the Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, a state may assume the Secretary of Transportation's responsibilities to comply with Section 106 for certain projects or classes of projects. In such cases, the state may rely on this program comment to fulfill its Section 106 responsibilities.

3. Where a program alternative developed pursuant to 36 CFR 800.14, such as a statewide programmatic agreement, delegates Section 106 responsibility to another entity, that entity may also utilize the terms of this program comment for relevant undertakings as applicable. This program comment does not supersede or modify any existing program alternatives, including existing executed programmatic agreements. In cases when this program comment and one or more other program alternatives apply to a proposed undertaking, the federal agency has discretion to determine which program alternative to follow.

B. Continued Applicability of Section 106

1. This program comment does not apply to, and the federal agency must comply with the requirements of 36 CFR part 800, or adhere to the terms of an applicable program alternative executed pursuant to 36 CFR 800.14, for the following:

a. Undertakings within rail ROW in the following situations:

i. Undertakings that are located within or would affect historic properties located on tribal lands;

ii. Undertakings consisting of activities not included in Appendix A and that may affect an excluded historic rail property designated by USDOT pursuant to section IV;

iii. Undertakings that could affect historic buildings, structures, sites, objects, or districts that do not have a demonstrable relationship to the function and operation of a railroad or rail transit system;

iv. Undertakings that could affect archaeological sites located in undisturbed portions of rail ROW, regardless of whether the sites are associated with railroads or

rail transit systems. An archaeologist meeting the Secretary of the Interior's Professional Qualifications (SOI qualified professional) may assist in identifying undisturbed soils; and

v. Undertakings that could affect historic properties of religious and cultural significance to federally recognized Indian tribes or Native Hawaiian organizations (NHOs).

b. Undertakings that are not within rail ROW. For undertakings for which the area of potential effects (APE) is partially within but extends beyond rail ROW, this program comment applies only to the portions of the undertaking within rail ROW. Federal agencies must consider potential effects to properties adjacent to rail ROW that could be affected by the undertaking, including noise or vibration effects or changes to a historic property's setting.

2. If an unanticipated discovery of a non-rail historic property, archaeological site of any nature, or human remains, or an unanticipated adverse effect on a previously identified non-rail historic property is made

during the implementation of an exempted activity listed in Appendix A, the Section 106 requirements at 36 CFR 800.13 and/or applicable burial law, as appropriate depending on the nature of the resource, apply because effects to such resources are not covered by this program comment. At minimum, the Project Sponsor must cease all work in the affected area, secure the area, and notify the federal agency within 72 hours. The federal agency will consult with the State Historic Preservation Officer (SHPO), federally recognized Indian tribes, NHOs, and any other stakeholders as appropriate, to determine the appropriate course of action. If an undertaking involves multiple exempted activities listed in Appendix A, those that do not involve or affect the non-rail resource, as determined by the federal agency, may continue. The Project Sponsor must comply with any applicable state and/or local law regarding the resource.

C. This program comment does not alter the requirements of any applicable easements, covenants, and/or state or local historic preservation ordinances. Other federal and state laws such as the National Environmental Policy Act and Section 4(f) of the USDOT Act also remain applicable, as appropriate.

III. Activities-Based Approach to Exempting Consideration of Effects Under Section 106

A. Undertakings to maintain, improve, or upgrade rail properties located in rail ROW that are limited to the activities specified in Appendix A are exempt from the requirements of Section 106 because their effects on historic rail properties are foreseeable and likely to be minimal or not adverse. The activities included in Appendix A are exempt from further Section 106 review regardless of whether the rail properties affected are eligible for or listed on the National Register of Historic Places or whether the activities may affect an excluded historic rail property as designated by USDOT pursuant to section IV.

B. If a SHPO, a federally recognized Indian tribe, or an NHO believe an undertaking carried out under Appendix A is adversely affecting or has adversely affected a historic rail property, the SHPO, Indian tribe, or NHO may notify the federal agency responsible for the undertaking of its concern. The federal agency will promptly investigate the concern within 72 hours of the notification. The federal agency will then determine the appropriate course of action, in consultation with the Project Sponsor, SHPO, Indian tribe, NHO, and other stakeholders, as appropriate.

IV. Property-Based Approach to Exempting Consideration of Effects under Section 106

Project Sponsors may opt to collaborate with a USDOT Operating Administration (OA) to designate excluded historic rail properties within a defined study area, as described in section IV.A, for which the federal agency must comply with requirements of Section 106 for undertakings that have the potential to affect those properties. Once a USDOT OA formally excludes historic rail properties within a study area, consideration of effects to all other evaluated rail properties within that study area shall be exempt from Section 106 review for any undertaking by any federal agency. In accordance with section IV.C. below, USDOT will publish implementing guidance that will provide further detail regarding the identification and evaluation of excluded historic rail properties. This property-based approach shall go into effect on the date USDOT publishes the implementing guidance no later than October 14, 2019.

A. Identification of Excluded Historic Rail Properties

1. A Project Sponsor that opts to follow the property-based approach to identify excluded historic rail properties must follow the steps outlined below, in accordance with the implementing guidance. To provide

maximum flexibility and utility in this process, a Project Sponsor can opt-in on its preferred timeline.

a. A Project Sponsor must clearly define the study area, i.e., the portion of rail ROW to be evaluated, which can be identified by location (e.g., state, county), name of rail corridor, railroad, rail transit system or line, and/or mile-post information, etc.

b. A Project Sponsor may choose to evaluate for designation as excluded historic rail properties either (i) all rail properties in the defined study area, or (ii) a particular property type or types, such as rail bridges, stations and depots, tunnels, etc. within the defined study area.

c. A Project Sponsor's evaluation efforts should also be informed by a variety of available and existing information, including historic context studies, local and state inventories, surveys and evaluations; railroad company records (e.g., bridge inventories or inspection reports); knowledgeable railroad and rail transit personnel; railroad and rail transit historical society museum and archival collections; railroad and rail transit enthusiast website publications;

state or local historic preservation organizations; and other relevant documentation and professional experience and expertise. Prior to submitting its proposed list to the USDOT OA, each Project Sponsor must notify the SHPO(s) in the state(s) within which the study area lie(s), and Indian tribes or NHOs who may attach religious and cultural significance to historic properties within the study area, of its evaluation efforts to identify excluded properties and request their input. If existing information is not available to determine the potential historic significance of rail properties within the defined study area, the USDOT OA may require the Project Sponsor to conduct a physical survey of the study area carried out by or under the direct supervision of individuals meeting the SOI's professional qualifications.

d. A Project Sponsor must submit to the USDOT OA the rail properties it proposes be designated as excluded historic rail properties, along with a summary of its evaluation efforts including whether it evaluated all rail properties within

the study area or only a certain type(s) of rail property, in accordance with the implementing guidance.

2. Once a Project Sponsor submits a proposal to designate excluded historic rail properties for a study area to the USDOT OA, the USDOT OA will take the following actions to review and designate excluded historic rail properties:

a. The USDOT OA will review each proposal received from a Project Sponsor in accordance with the implementing guidance. The USDOT OA shall notify and request the input of the SHPO(s), Indian tribes, and/or NHOs when reviewing a Project Sponsor's proposal. The USDOT OA will have the discretion to require a Project Sponsor to conduct additional evaluation and/or provide additional documentation to demonstrate that the Project Sponsor made a reasonable effort to identify potential excluded rail properties. Following its review of a Project Sponsor's proposal, the USDOT OA will make the proposed list, modified as necessary based on its review and any consultation or additional evaluation or documentation, available for public review and

comment, and will consider input from interested parties and the public before designating the excluded historic rail properties within a study area. The USDOT OA may seek input from the ACHP, including advice regarding resolution of any objections or concerns from commenters, before making such designations. The USDOT may, as needed, consult with the Keeper of the National Register to resolve questions or disagreements about the National Register eligibility of any rail properties.

b. The USDOT OA will designate excluded historic rail properties within a study area within 12 months of receipt of a Project Sponsor's adequately supported proposal, in accordance with the implementing guidance.

c. USDOT will publish and periodically update the list of designated excluded historic rail properties on its website (www.transportation.gov).

B. Effect of Designation as an Excluded Historic Rail Property

1. All undertakings that may affect USDOT-designated

excluded historic rail properties are subject to Section 106. However, undertakings that include activities listed in Appendix A require no further Section 106 review regardless of the rail property that would be affected, including excluded historic rail properties.

2. Once a USDOT OA designates excluded historic rail properties within a study area and the list is published on the USDOT website, consideration of effects to all other evaluated rail properties within that study area are exempt from Section 106 review. If a Project Sponsor chooses to evaluate only a specific rail property type, rather than all historic properties, within a study area, then consideration of effects to rail properties other than the type evaluated remain subject to Section 106.

C. Implementing Guidance

1. By October 14, 2019, USDOT, in coordination with the ACHP and other federal agencies who may have an interest in utilizing the Program Comment, will publish guidance for implementing the property-based approach.

2. The guidance will: provide further instruction and examples for evaluating rail properties for potential designation as excluded historic rail properties to remain subject to Section 106; describe the process by which a Project Sponsor may propose excluded historic rail

properties to a USDOT OA, including early coordination between the Project Sponsor and the USDOT OA; establish timeframes for USDOT OA review of proposals and designation of excluded historic rail properties; and establish public involvement methods.

V. Definition of Terms

Any terms not defined below shall follow the definitions in the NHPA, 54 U.S.C. §§ 300301-300321, and in 36 CFR parts 60 and 800.

A. "Area of potential effects" is defined in 36 CFR 800.16(d) and means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

B. "Excluded historic rail properties" means those historic properties that illustrate the history of the development of the nation's railroads or rail transit systems and:

1. are at least 50 years old, possess national significance, and meet the National Register eligibility criteria as defined in 36 CFR 60.4;

2. are less than 50 years old, possess national significance, meet the National Register eligibility criteria, and are of exceptional importance;

3. were listed in the National Register, or determined eligible for the National Register by the Keeper pursuant to 36 CFR part 63, prior to the effective date of the Program Comment and retain eligibility as determined by the USDOT OA; or

4. are at least 50 years old and meet the National Register eligibility criteria at the state or local level of significance, as determined by the USDOT OA.

C. "Historic property" is defined in 36 CFR 800.16(1) and means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of religious and cultural importance to a federally recognized Indian tribe or Native Hawaiian organization that meet the National Register criteria.

D. "In-kind" means that new materials used in repairs or replacements match the material being repaired or replaced in design, color, texture, other visual properties, and,

where possible, materials. For more information, see The Secretary of the Interior's Standards for Rehabilitation, at <https://www.nps.gov/tps/standards/rehabilitation.htm>.

E. "National significance" means a historic property that is eligible or listed in the National Register and either:

1. designated as a National Historic Landmark;
2. designated as a Historical Civil Engineering Landmark;
3. listed as nationally significant in its nomination or listing in the National Register; or
4. determined by a USDOT OA to have significance at the national level.

F. "Project Sponsor" means an entity such as a state, tribal or local government, joint venture, railroad commission, compact authority, port authority, transit agency or authority, or private company that is eligible to receive federal financial assistance (e.g., grant, loan). A Project Sponsor may also be an entity that requires a federal permit, license, or approval to carry out a proposed activity in rail ROW (e.g., a permit under Section 404 of the Clean Water Act issued by the Army Corps of Engineers or a permit under Section 9 of the Rivers and Harbors Act of 1899 issued by the United States Coast Guard).

G. "Rail properties" means infrastructure located within rail ROW that has a demonstrable relationship to the past or current function and operation of a railroad or rail transit system, including but not limited to: rails and tracks, ties, ballast, rail beds, signal and communication systems, switches, overhead catenary systems, signage, traction power substations, passenger stations/depots and associated infrastructure and utilities, freight transfer facilities, boarding areas and platforms, boarding platform shelters and canopies, bridges, culverts, tunnels, retaining walls, ancillary facilities, ventilation structures, equipment maintenance and storage facilities, railyards and rail transit yards, parking lots and parking structures, landscaping, passenger walkways, and security and safety fencing. Rail properties may also include a section of a railroad or rail transit line. The definition does not include properties with no demonstrable relationship to the function and operation of a railroad or rail transit system, such as: adjacent residential, commercial or municipal buildings; or property unrelated to existing or former railroads and rail transit lines that is proposed to be used for new rail infrastructure.

H. "Railroad and Rail Transit Rights-of-Way" means the land and infrastructure that have been developed for

existing or former intercity passenger rail, freight rail, rail transit operations, or that are maintained for the purpose of such operations. Rail ROW includes current and/or former railroad or rail transit lines regardless of current ownership and whether there is rail service operating on the railroad or rail transit line. It includes property that was previously developed for railroad or rail transit use even though the infrastructure has been modified or removed, and the property may lack visual evidence of previous railroad or rail transit use. It does not include land that was never developed for railroad or rail transit use. Rail ROW includes and may be identifiable by the presence of infrastructure that has a demonstrable relationship to the past or current function and operation of a railroad or rail transit system that commonly includes but is not limited to the rail properties specified in the definition above.

I. "Section 106" means Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108.

J. "Study area" means the portion of rail ROW identified for the purposes of the evaluation under the property-based approach described in section IV. It may be delineated by: location (e.g., state, county); name of rail corridor,

railroad, rail transit system or line; or mile-post information.

K. "Undertaking" is defined at 36 CFR 800.16(y) and means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license, or approval.

L. "Undisturbed portions of rail ROW" means soils that have not been physically impacted by previous construction or other ground disturbing activities such as grading. Undisturbed soils may occur below the depth of previously disturbed soils or fill.

M. "USDOT OA" means the United States Department of Transportation's Operating Administrations, including the Federal Railroad Administration, the Federal Transit Administration, and the Federal Highway Administration.

VI. Effective Date

The activities-based approach to exempting consideration of effects under Section 106, as described in section III, shall go into effect on the date the program comment is issued by the ACHP. At that time, federal agencies may immediately utilize the list of exempted

activities in Appendix A. This includes undertakings that have not yet been initiated and undertakings for which the Section 106 review process is underway but not completed.

The property-based approach to exempting consideration of effects under Section 106, as described in section IV, shall go into effect on the date USDOT publishes the implementing guidance in accordance with section IV.C.

VII. Program Comment Review

Within one year of the issuance of this program comment, and every two years thereafter, the USDOT OAs and the ACHP shall evaluate the ongoing effectiveness and efficiency of the implementation of this program comment. The USDOT OAs shall review their use and application of the program comment, and may invite transportation stakeholders to participate in this review as appropriate.

VIII. Amendment

The ACHP may amend this program comment after consulting with the USDOT OAs and other relevant federal agencies, the National Conference of State Historic Preservation Offices (NCSHPO), National Association of Tribal Historic Preservation Officers (NATHPO), tribal representatives, the National Trust for Historic Preservation, and representatives from the railroad and rail transit industry, as appropriate. The ACHP will

publish a notice in the Federal Register informing the public of any amendments that are made to the program comment.

IX. Withdrawal

The ACHP may withdraw this program comment, pursuant to 36 CFR § 800.14(e)(6), by publication of a notice in the Federal Register 30 days before the withdrawal will take effect.

Appendix A: Exempted Activities List

I. General Rule

A. The federal agency is responsible for determining if an undertaking is covered by one or more activities in the Exempted Activities List. At its discretion, the federal agency may require the Project Sponsor to provide relevant documentation, such as plans, photographs, or materials specifications, so that the federal agency can determine whether the Exempted Activities List applies.

B. Whenever possible, historic materials must be repaired rather than replaced. At its discretion, the federal agency may require the Project Sponsor to provide written justification explaining why repair is not feasible. In cases where existing historic materials are beyond repair, replacement must be carried out in-kind as defined below.

C. Several of the activities in the Exempted Activities List require that the work be "in-kind." For purposes of this program comment, "in-kind" means that new materials used in repairs or replacements match the material being repaired or replaced in design, color, texture, other visual properties, and, where possible, materials. For more information, see The Secretary of the Interior's Standards for Rehabilitation, at

<https://www.nps.gov/tps/standards/rehabilitation.htm>.

Except where specified in the Exempted Activities List, a Project Sponsor is not required to involve an SOI-qualified professional in carrying out in-kind work. However, the federal agency, at its discretion, may require the Project Sponsor to provide documentation demonstrating that the work would be in-kind, utilize non-damaging or reversible methods, etc.

D. Certain activities, as specified in the Exempted Activities List, require that the federal agency and Project Sponsor ensure the work is performed by or under the supervision of individuals that meet the SOI's Professional Qualification Standards in Architectural History, Architecture, and/or Historic Architecture (see 36 CFR Appendix A to Part 61), as appropriate, and must be performed in accordance with the SOI Standards for the

Treatment of Historic Properties

(<https://www.nps.gov/tps/standards.htm>). If an SOI-qualified professional is not available to assist in the evaluation and/or design of a specified activity, that activity is not exempt from Section 106 review.

E. The Exempted Activities List does not apply to archaeological sites of any nature located within undisturbed portions of rail ROW. Therefore, if an exempted activity would cause ground disturbance in undisturbed portions of the rail ROW, the federal agency is responsible for complying with Section 106 regarding consideration of potential effects to archaeological sites before approving the undertaking.

F. The Exempted Activities List does not apply to non-railroad or rail transit related buildings or structures located within or adjacent to rail ROW within an undertaking's APE. The federal agency remains responsible for determining whether an activity in the Exempted Activities List has the potential to affect non-rail historic properties and for complying with Section 106 with regard to those properties before approving the undertaking.

G. If an unanticipated discovery of a non-rail historic property, archaeological site of any nature, or human

remains, or an unanticipated adverse effect on a previously identified non-rail historic property is made during the implementation of an activity on the Exempted Activities List, the Section 106 requirements at 36 CFR 800.13 and/or applicable burial law, as appropriate depending on the nature of the resource, apply because effects to such resources are not covered by this program comment. At minimum, the Project Sponsor must cease all work in and secure the area and notify the federal agency within 72 hours. The federal agency will consult with SHPO, federally recognized Indian tribes, NHOs, and other stakeholders as appropriate, to determine the appropriate course of action. The Project Sponsor must comply with any applicable state or local law regarding the resource. If an undertaking involves multiple activities on the Exempted Activities List, those that do not involve or affect the non-rail resource, as determined by the federal agency, may continue.

H. The Project Sponsor must comply with the requirements of any applicable easements, covenants, and/or state or local historic preservation ordinances. Other federal and state laws such as the National Environmental Policy Act and Section 4(f) of the USDOT Act also remain applicable to activities exempted from Section 106, as appropriate.

II. Exempted Activities List

A. Track and Trackbed

1. Track and trackbed maintenance, repair, replacement, and upgrades within the existing footprint (i.e., existing subgrade, sub-ballast, ballast, and rails and crossties (track)). These activities must not include alterations to the trackbed that would result in a substantial visual change (i.e., elevation or alignment) in the relationship between the trackbed and the surrounding landscape or built environment.

2. Reinstallation of double tracking on a currently single-tracked line that had historically been double-tracked.

B. Bridges and Tunnels

1. In-kind maintenance and repair of bridges and tunnels.

2. In-kind replacement of bridge hardware and mechanical and electrical components (e.g., brackets, rivets, bearings, motors).

3. Maintenance or repair of tunnel ventilation structures and associated equipment (e.g., fans, ducting).

4. Replacement of tunnel ventilation structures that are not located within a previously identified historic district.

5. Replacement of tunnel ventilation structures that are located and publicly visible within a previously identified historic district, provided the replaced structures are substantially the same size as or smaller than the existing structures and are visually compatible with the surrounding built environment.

6. Maintenance, repair, or replacement of tunnel emergency egress hatchways.

7. Maintenance, installation, repair, or replacement of lighting, signal and communications systems, railings, and other safety- and security-related equipment or elements located within the interiors of tunnels.

8. Removal or replacement of any bridge or tunnel material or added-on element that is not part of the original construction.

9. Actions to strengthen or repair deteriorating non-character defining structural components of bridges that are intended to maintain their useful life and safe use and that do not substantially alter the bridge from its existing appearance.

10. The following activity must be performed or supervised by an SOI-qualified professional: in-kind replacement of character-defining structural or non-structural components of a bridge superstructure or

substructure that do not diminish the overall integrity of the bridge. This does not include demolition of a bridge and replacement with an entirely new structure.

C. Railroad and Rail Transit Buildings (e.g., Passenger Stations and Depots, Maintenance and Equipment Buildings, Interlocking Towers) and Boarding Platforms

1. Modifications (e.g., repair, extension, widening, slope adjustments, changes in height) to non-character defining passenger platforms and walkways that are necessary to meet Americans with Disabilities Act (ADA) requirements or other federal or municipal public or life safety codes and standards, provided those changes do not require associated improvements such as relocation of station doors, construction of ramps, etc. When the original material and construction used something other than common concrete or asphalt methods (e.g., decorative brick or tile), new materials (e.g., non-slip) may be used but must visually match the existing decorative pattern.

2. Maintenance or repair of escalators, elevators, or stairs. Repair of decorative (i.e., non-mechanical) elements must be in-kind. Repair of stairs constructed of material other than common concrete (e.g., brick, tile, marble) must be in-kind.

3. Cleaning, painting, or refinishing of surfaces

with a like color and where the products or methods used would not damage the original surface.

4. Maintenance, repair, or replacement of fire or security alarm or fire suppression systems, physical access controls, security cameras, wireless Internet, and similar safety, security, or computer equipment and devices.

5. Installation of new fire or security alarm or fire suppression systems, physical access controls, security cameras, wireless Internet, and similar safety, security, or computer equipment and devices, except within publicly accessible areas of stations or depots. Such new installations must, to the extent feasible and when appropriate, use a minimally obtrusive design; match the color of surrounding paint, wall coverings, finishes, etc.; avoid damaging or removing historic fabric; be attached to non-historic fabric; be concealed within existing enclosures or conduit or behind walls and ceilings; be co-located with existing similar modern equipment, etc.

6. Maintenance, repair, or replacement of HVAC or electrical systems.

7. Installation of new HVAC or electrical systems, except within publicly accessible areas of stations or depots. Such new installations must, to the extent feasible and when appropriate, use a minimally obtrusive design;

match the color of surrounding paint, wall coverings, finishes, etc.; avoid damaging or removing historic fabric; be attached to non-historic fabric; be concealed within existing enclosures or conduit or behind walls and ceilings; be co-located with existing similar modern equipment, etc.

8. Minor ADA improvements at passenger stations that do not damage, cover, alter, or remove character-defining architectural spaces, features, or finishes. Examples include the installation of restroom stalls/partitions, hardware and fixtures such as grab bars, tilt frame mirrors, and sinks and toilets; tactile warning strips on floors, passenger walkways, and platforms; cane detectors; sidewalk curb cuts; automatic door openers; and handrails.

9. Maintenance, repair, or replacement of previously installed ADA elements.

10. Maintenance, repair, or replacement of pumps, air compressors, or fueling stations.

11. Removal of mechanical equipment inside railroad and rail transit facilities not visible to the public. Examples include relay panels, switchgear, and track diagram boards. If the equipment to be removed includes obsolete or outdated technology, the Project Sponsor must contact the SHPO, railroad museums or railroad historical

societies, museums, educational institutions, or similar entities to determine if there is an entity that may be interested in purchasing or receiving the equipment as a donation, as appropriate. The Project Sponsor must demonstrate to the federal agency that it has made a good faith effort to contact such parties prior to removal and disposition of such equipment.

12. Addition of new mechanical equipment in basements, beneath platforms, in designated mechanical equipment areas, or in areas that are otherwise out of public view.

13. Paving, painting, or striping of existing parking surfaces.

14. In-kind maintenance or repair of platform boarding canopies and supports.

15. In-kind maintenance or repair of architecturally distinctive light poles and fixtures.

16. State-of-good-repair (SOGR) activities not included elsewhere in this section that are necessary to keep a station, depot, or other railroad or rail transit building inhabitable and safe, as required by applicable federal or municipal fire, life safety, or health codes or standards, and in transportation-related use that meet the following conditions:

- a. Maintenance and repair activities that affect character-defining architectural features (e.g., elevator head houses and portals; roofs; doors; windows; stairs; platform canopies; columns; floors; ceilings) must be in-kind.
- b. SOGR activities do not include demolition, decommissioning, or mothballing of railroad or rail transit buildings that are not in use, or reconfiguring the interior spaces of passenger stations for a new use (e.g., enclosing a passenger waiting area to create new office, baggage handling, or event space).

17. Maintenance, repair, or replacement activities that are not included elsewhere on this list and involve non-character-defining non-structural elements, features, systems, hardware, and fixtures in the interior or on the exterior of non-station railroad or rail transit buildings.

18. In-kind maintenance or repair of original architectural features in the interior or on the exterior of passenger stations (e.g., handrails, ticket counters, mouldings).

19. In-kind maintenance or repair of character-defining signage (e.g., station identifier, wayfinding) within publicly accessible areas of stations or depots.

20. Maintenance, repair, or replacement of non-character defining signage (e.g., station identifier, wayfinding) within publicly accessible areas of stations or depots.

21. The following activities must be performed or supervised by an SOI-qualified professional:

- a. Replacement of character defining escalators, elevators, or stairs, and decorative elements related thereto.
- b. ADA improvements at passenger stations that involve the modification or removal of character-defining features such as stairs, floors, ceilings, doors, windows, roofs, platform boarding canopies and supports, benches/seating, or ticket counters; or that involve the addition of new ramps, stairs, escalators, elevators, wheelchair lifts, wheelchair lift enclosures, station identifier and wayfinding signage, and public information display systems (PIDS).
- c. SOGR activities that include replacement of character-defining architectural features or otherwise require substantial rehabilitation to address deteriorated conditions. As previously indicated, SOGR activities do not include

demolition, decommissioning, or mothballing of railroad or rail transit buildings that are not in use, or reconfiguring the interior spaces of passenger stations for a new use (e.g., enclosing a passenger waiting area to create new office, baggage handling, or event space).

d. Installation of new fire or security alarm or fire suppression systems, physical access controls, security cameras, wireless Internet, and similar safety, security, or computer equipment and devices within publicly accessible areas of stations or depots.

e. Installation of new HVAC or electrical systems within publicly accessible areas of stations or depots.

f. Replacement of platform boarding canopies and supports.

g. Replacement of architecturally distinctive light poles and fixtures.

h. Replacement of original architectural features in the interior or on the exterior of passenger stations (e.g., handrails, ticket counters, mouldings).

- i. Replacement of character-defining signage (e.g., station identifier, wayfinding) within publicly accessible areas of stations or depots.

D. Signals, Communications, and Power Generation

1. Maintenance, repair, or replacement of component parts of signal, communications, catenary, electric power systems, or other mechanical equipment that retains the visual appearance of the existing infrastructure. This includes replacement of individual signal masts or transmission lines, but does not include demolition and replacement of an entire catenary system or signal bridge.

2. Maintenance, repair, or replacement of radio base stations.

3. Maintenance, repair, or replacement of the mechanical components of traction power substations, e.g., transformers, circuit breakers, electrical switches. This does not include demolition and replacement of an entire substation.

4. In-kind maintenance or repair of signal bungalows, signal houses, control houses, instrument houses, and structures of similar function.

5. Installation, repair, or replacement of communications equipment on locomotives and rolling stock that are actively used for intercity passenger rail, rail

transit, or freight rail. This does not apply to historic trains used for tourism.

6. The following activities must be performed or supervised by an SOI-qualified professional:

- a. Replacement of signal bungalows, signal houses, control houses, instrument houses, and structures of similar function.

E. Railroad and Rail Transit/Roadway At-Grade Crossings and Grade Separations

1. Maintenance, repair, or rehabilitation of at-grade railroad and rail transit crossings including installation of railroad and rail transit crossing signs, signals, gates, warning devices and signage, highway traffic signal preemption, road markings, paving and resurfacing, and similar safety improvements.

2. Replacement of at-grade railroad and rail transit crossings on existing railroads, rail transit lines, and roadways, including components such as crossing signs, signals, gates, warning devices and signage, highway traffic signal pre-emption, road markings, paving and resurfacing, and similar safety features.

3. Expansion of sidewalks, constructed with common concrete or asphalt methods, along the sides of an existing at-grade railroad or rail transit crossing.

4. In-kind maintenance or repair of grade-separated crossings of other transportation modes (highways, local roads, pedestrian underpasses).

5. In-kind rehabilitation or replacement of grade-separated crossings of other transportation modes (highways, local roads, pedestrian underpasses). This does not include modifications to existing grade separation structures (e.g., bridges, overpasses) that would result in a substantial increase in height or overall massing or substantial change in appearance. Replacements must be substantially the same appearance and size as existing.

6. Addition of lanes, turning lanes, road widening, and pavement markings at existing at-grade crossings when the crossing does not involve an individual National Register-listed or known historic roadway or a roadway that is a contributing resource to a National Register-listed or known historic district.

7. Construction of curbs, gutters, or sidewalks adjacent to existing roadway at existing at-grade crossings when the crossing does not involve an individual National Register-listed or eligible roadway or a roadway that is a contributing resource to a National Register-listed or eligible historic district.

8. The following activities must be performed or

supervised by an SOI-qualified professional:

- a. Addition of lanes, turning lanes, road widening, and pavement markings at existing at-grade crossings when the crossing involves an individual National Register-listed or eligible roadway or a roadway that is a contributing resource to a National Register-listed or eligible historic district.
- b. Construction of curbs, gutters, or sidewalks adjacent to existing roadway at existing at-grade crossings when the crossing involves an individual National Register-listed or eligible roadway or a roadway that is a contributing resource to a National Register-listed or eligible historic district.

F. Safety and Security

1. Maintenance, repair, replacement, or installation of the following security and intrusion prevention devices adjacent to tracks or in railyards or rail transit yards: security cameras, closed captioned television (CCTV) systems, light poles and fixtures, bollards, emergency call boxes, access card readers, and warning signage.

2. Maintenance, repair, replacement, or installation

of security and safety fencing, guardrails, and similar intrusion prevention and fall protection measures.

3. Maintenance, repair, replacement, or installation of safety equipment/fall protection equipment on rail bridges, signal bridges, or other non-station structures for the protection of rail workers or the public. Examples include railings, walkways, gates, tie-off safety cables, anchors, and warning signage.

4. Maintenance, repair, replacement, or installation of wayside detection devices.

5. Maintenance, repair, replacement, or installation of bridge clearance/strike beams.

G. Erosion Control, Rock Slopes, and Drainage

1. Placement of riprap and similar bank stabilization methods to prevent erosion affecting bridges and waterways.

2. Erosion control through slide and slope corrections.

3. Rock removal and re-stabilization activities such as scaling and bolting.

4. Maintenance, repair, or replacement of pre-cast concrete, cast iron, and corrugated metal culverts that lack stone or brick headwalls. This does not include culverts such as those built by the Civilian Conservation

Corps or those made out of unique materials (e.g., a hollowed log).

5. Expansion through horizontal elongation of pre-cast concrete, cast iron, and corrugated metal culverts that lack stone or brick headwalls for the purpose of improved drainage.

6. Embankment stabilization or the re-establishment of ditch profiles.

7. Corrections to drainage slopes, ditches, and pipes to alleviate improper drainage or changing alluvial patterns.

8. In-kind maintenance, repair, or replacement of retaining walls. Replacements must be substantially the same size and appearance as existing.

9. In-kind maintenance or repair of stone or brick culvert headwalls and wingwalls.

10. Maintenance, repair, or replacement of culvert headwalls and wingwalls constructed of concrete.

11. Maintenance, repair, or alterations to the interiors of culverts and related drainage pathways.

12. The following activities must be performed or supervised by an SOI-qualified professional:

- a. Replacement of stone or brick culvert headwalls and wingwalls.

- b. Vertical extension of stone or brick culvert headwalls using in-kind materials and design compatible with existing.

H. Environmental Abatement

- 1. Removal or abatement of environmental hazards such as asbestos, treated wood, and lead or heavy-metal coatings and paintings. Activities that replace coatings, paint, flooring materials, etc. must be of the same color and appearance as the materials that have been removed or abated.

- 2. Removal of contaminated ballast, sub-ballast, subgrade, and soils.

I. Operations

- 1. Establishment of quiet zones, including the installation of required warning devices and additional safety measures installed at grade crossings, that do not entail closing of existing roadways.

- 2. Increased frequency of train or rail transit operations that do not result in noise or vibration impacts. The lead federal agency may, at its discretion, require a noise and vibration study be prepared by a qualified subject matter expert before approving the undertaking.

- 3. Temporary storage of rail cars or rail transit

cars on active rail lines.

4. Maintenance, repair, or replacement of noise barriers. If a replaced noise barrier is to be located and publicly visible within a National Register-listed or eligible historic district, it must be substantially the same size as or smaller than existing and be visually compatible with the surrounding built environment.

J. Landscaping, Access Roads, and Laydown Areas

1. In-kind replacement of landscaping.

2. Mowing, seeding/reseeding, planting, tree trimming, brush removal, or other similar groundcover maintenance activities.

3. Maintenance of access roads and lay-down areas.

K. Utilities

1. Maintenance, repair, or replacement of above-ground and underground utilities (e.g., electrical, sewer, compressed air lines, fuel lines, fiber optic cable).

2. Maintenance, repair, replacement, or installation of utility lines and conduit inside tunnels that does not involve affixing new equipment to the exterior face of tunnel portals.

3. Affixing conduit, repeaters, antennae, and similar small-scale equipment on the exterior masonry face of tunnel portals where the color of the equipment matches

the existing masonry in order to limit its visibility and does not damage the masonry construction.

L. Bicycle and Pedestrian Facilities, Shared Use Paths, and Other Trails

1. Maintenance, repair, or replacement of existing bicycle lanes, pedestrian walkways, shared use paths (e.g., bicycle, pedestrian), and other trails intended for non-motorized transportation that are constructed with common materials (i.e., non-decorative concrete, asphalt, pavement, or gravel).

2. Adding lanes to existing shared use paths or other trails constructed with common materials.

3. Adding at-grade crossings for pedestrians and bicycle facilities, shared use paths, or other trails.

4. Maintenance, repair, replacement, or installation of bicycle aid stations, bicycle racks, and bicycle storage sheds, and similar amenities. Installation of new bicycle storage structures must be visually compatible with the surrounding building environment when located adjacent to historic passenger stations or within National Register-listed or eligible historic districts.

5. Maintenance, repair, replacement, or installation

of information kiosks or displays, wayfinding signage, and similar amenities for pedestrian, bicyclists, or other path or trail users.

6. Maintenance, repair, or replacement of curbs, gutters, or sidewalks constructed with common materials.

M. Construction/Installation of New Railroad or Rail Transit Infrastructure. For any of the activities listed below, the federal agency shall require the work be performed by or under the supervision of an SOI-qualified professional, based on the scope of work and location of a specific proposal. As with all activities in this Exempted Activities List, but especially important for construction/installation of new railroad or Rail Transit infrastructure, consideration must be given to the potential for effects to non-rail properties within or adjacent to the rail ROW.

1. Minor new construction and installation of railroad or rail transit infrastructure that is compatible with the scale, size, and type of existing rail infrastructure, such as buildings for housing telecommunications equipment, signal instruments, and similar equipment; storage buildings that house landscaping or maintenance of way equipment or specialty vehicles for track repairs or inspections; locomotive and train or rail

transit car service and inspection facilities; trailers or temporary structures for housing rail personnel; fueling stations; underground utilities; overhead utilities, transmission lines, and communications poles, and signage. This does not include substantial new construction, such as construction of new passenger stations, railyards or rail transit yards, or tunnels, or demolition of existing structures.

2. Construction of new at-grade crossings.

3. Construction of new erosion control, drainage, or stormwater management infrastructure, such as culverts or retaining walls.

(END OF DOCUMENT)

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John M. Fowler,

Executive Director.

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